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# In the Supreme Court of the United States

COEUR ALASKA, INC., *Petitioner,*

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

STATE OF ALASKA, *Petitioner,*

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

## BRIEF OF THE RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC.AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST[1]

The Resource Development Council for Alaska, Inc. ("RDC") is an Alaska-based, non-profit, membership-funded trade organization comprised of businesses and individuals from all resource sectors (oil and gas, mining, fishing, timber, and tourism), as well as support sectors, labor unions, and local governments. Of particular importance to the discussion below, all thirteen Alaska Native Regional Corporations created through the Alaska Native Claims Settlement Act are members of the RDC. Through the RDC, these interests work together to promote and support responsible development of Alaska's natural resources.

As part of its mission, the RDC works with federal, state, and local government officials to provide information and analysis on public policy issues of concern to its membership. The RDC's efforts in this regard include providing input on implementation of the Clean Water Act, such as

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[1] This amicus brief is filed with the consent of the parties. With the exception of the United States, all petitioners and respondents have filed letters with the Clerk of the Court consenting to the filing of amicus briefs pursuant to the Court's Rule 37.3(a). Respondent United States' letter of consent is being filed with the Clerk of the Court together with this brief. Under Rule 37.6, the amicus submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than amicus paid for or made a monetary contribution toward the preparation and submission of this brief.

submitting comments on federal agency jurisdiction following this Court's decision in *Rapanos v. United States*.

The RDC also regularly participates as an *amicus* in federal court litigation centering on resource development issues affecting Alaska. *E.g.*, *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987); *Schultz v. Dept. of Army*, 96 F.3d 1222 (9th Cir. 1996); *Cook Inlet Beluga Whale v. Daley*, 156 F. Supp. 2d 16 (D. D.C. 2001).

Due to its potentially serious impact on the responsible development of Alaska's resources, and especially because that impact will have a disproportionately large effect on the state's Native community, the issue presented in this appeal is of great importance to the RDC and its membership.

In *Rapanos v. United States* this Court recognized that the Corps of Engineers and the EPA have classified the "waters of the United States" to comprise half of the land area of Alaska.[2] In many cases these waters are the only practical location where mine tailings can be disposed of in an environmentally-sound manner. But following the Ninth Circuit's flawed interpretation of the Clean Water Act in *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, all of these waters – regardless of their suitability for use as disposal sites

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[2] *Rapanos*, 547 U.S. 715, 722, 126 S. Ct. 2208, 2215, 165 L. Ed. 2d 159 (2006) (plurality opinion) (Scalia, J.).

– are off-limits for mines using processes for which effluent limitations have been adopted.

The Ninth Circuit's decision is at odds with the language and purpose of the Clean Water Act, and promises to shackle responsible resource development throughout Alaska. The Clean Water Act should be read according to its plain language, which calls for separate permitting schemes for the disposal of mine tailings (*i.e.*, "fill" under Section 404), and the discharge of pollutants (Section 402). The Ninth Circuit's erroneous conflation of these two separate permitting schemes threatens the feasibility of future development of Alaska's resource base.

Accordingly, the RDC participates in this appeal for the purpose of assisting the Court in understanding the practical implications of the Ninth Circuit's decision on the Alaska economy – particularly the substantial harm to Alaska Native corporations (the largest private landowners in the state) and their shareholders (essentially co-extensive with Alaska's Native community) that could result if this Court affirms the decision.

## PRELIMINARY STATEMENT

Given the parties' briefing already before the Court, the RDC's amicus brief will not address the substantive legal issues at play in this appeal regarding the intent of the Clean Water Act – other than to agree with the petitioners and federal respondents that the Ninth Circuit erred when it

declined to defer to the implementing agencies' interpretation of the Act, and instead interpreted the Clean Water Act in a manner contrary to the Act's plain language.

In addition, other *amicus* briefs submitted in support of the petitioner discuss the impact the Ninth Circuit's decision will have on the mining industry generally and those who depend on the jobs and revenue mining generates in Alaska. The RDC's brief will thus focus specifically on the consequences to Alaska's Native Corporations and the Alaska Native community, as well as to Alaska generally, if this Court affirms the Ninth Circuit.

## SUMMARY OF ARGUMENT

Alaska's economy depends on responsible development of its vast natural resources. Mining is a critical part of that development. Alaska's mining industry is growing rapidly, with exploration and development occurring throughout the state. Mining provides revenue and employment opportunities that benefit the entire state. But as the Kensington mine (the subject of this appeal) illustrates, the Ninth Circuit's decision threatens to dismantle this critical economic engine.

This threat holds true for Native Corporations established through the Alaska Native Claims Settlement Act ("ANCSA"). Congress enacted ANCSA in order to provide a means by which Alaska Natives could derive economic benefits from the resources around them. Native Corporations are the

largest private landowners in Alaska, with title to tens of millions of acres of selected land throughout the state. Mining offers Native corporations a real opportunity to generate jobs and other economic benefits for their Native shareholders, and fulfill the implicit promise Congress made to Alaska Natives when it offered them resource-rich lands in exchange for extinguishment of their aboriginal claims.

A growing number of Alaska Native Corporations are fulfilling ANCSA's economic goals by partnering with the mining industry in resource development projects around the state. These partnerships are helping to make ANCSA's economic promise to Alaska Natives become a reality.

But the Ninth Circuit's decision promises to derail this trend. As this Court itself recognized in *Rapanos*, 547 U.S. at 722, 126 S. Ct. at 2215, the EPA and Corps of Engineers have declared nearly "half of Alaska" (approximately 175 million acres – bigger than Texas) as waters or wetlands subject to regulation under the Clean Water Act.[3] Given this abundance, it is virtually impossible to develop large-scale mining projects in Alaska that do not affect wetlands or other waters that are subject to Clean Water Act regulation. Wetlands are especially pervasive in rural western and northern Alaska, where resource development offers the best realistic

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[3] Amicus Brief of Council of Alaska Producers in support of Petitioner at 4-5 (citing Envt'l Protection Agency et al, *Alaska Wetlands Initiative Summary Report* at 2 (1994). *See also* U.S. Army Corps of Engineers/Alaska District: Regulatory Program, http://www.poa.usace.army.mil/reg (last visited Sept. 12, 2008).

chance for private-sector investment and real economic growth.

The Ninth Circuit's decision requiring that a Section 404 fill permit be contingent on compliance with Sections 301, 306 and 402 of the Clean Water Act has created a broad prohibition against utilizing Alaska's waters when any of a number of conventional mining processes are used, as mining inherently produces tailings. This decision unduly ties the hands of the federal permitting and land management agencies charged with implementing the Act, and overturns by judicial fiat the longstanding role of these agencies in devising workable mine tailings disposal plans. The court of appeals' decision promises to hobble resource development on ANCSA lands, to the economic detriment of Native Corporations and their Alaska Native shareholders.

## ARGUMENT

### I. THE SUCCESS OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT DEPENDS ON NATURAL RESOURCE DEVELOPMENT

#### A. Congress intended that ANCSA allow Alaska Natives to reap economic benefits through natural resource development on Native lands

Congress enacted the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.*, in 1971.[4] Through ANCSA, Congress intended to resolve pending aboriginal land and hunting and fishing claims in Alaska by extinguishing those claims in return for granting native organizations fee title to selected lands.[5]

ANCSA also gave Alaska Natives a direct stake in Alaska's economic development.[6] Commentators have observed that "ANCSA was intended to be a development tool as much as a claims settlement, a way for one of America's poorest minority groups to escape from poverty on a self-determined path",[7] and that ANCSA "was drafted from the beginning with profitable business activities and resource developments in mind, so it can be viewed as a unique response to the interaction of native peoples and mineral development."[8]

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[4] Pub. L. 92-203, 85 Stat. 688 (Dec. 18, 1971) & ANCSA Amendments of 1987 (Act of Feb. 3, 1988, Pub. L. No. 100-241, 101 Stat. 1788).

[5] 43 U.S.C. § 1601(a). *See generally United States v. Atlantic-Richfield Co.*, 435 F. Supp. 1009, 1014-1020 (D. Alaska 1980), *aff'd*, 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888, 101 S. Ct. 243, 66 L. Ed. 2d 113 (1980) (describing in detail the history leading up to passage of ANCSA and the purposes and effect of the Act).

[6] 43 U.S.C. § 1601(b). *See also* ANCSA Amendments of 1987.

[7] Stephen Colt, Article: *Alaska Natives and the "New Harpoon": Economic Performance of the ANCSA Regional Corporations*, 25 J. Land Resources & Envtl. Law 155, 157 (2005) (footnotes & citations omitted).

[8] James D. Linxwiler, *The Alaska Native Claims Settlement Act at 35: Delivering on the Promise*, 53 Rocky Mtn. Min. L. Inst. 12 at 4 (2007).

Working in cooperation with Alaska Natives,[9] Congress crafted an innovative way to settle aboriginal land claims and to allow a means for Natives to become real stakeholders in Alaska's economy and the development of its resources: the Alaska Native Corporation.[10]

ANCSA divided Alaska into twelve geographic regions. Alaska Natives then organized a "Regional Corporation" for each region.[11] Each region also contains numerous smaller "Village Corporations" (about 225 in all).[12] ANCSA required every corporation to be organized under Alaska law.[13] (In addition, a thirteenth Regional Corporation was

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[9] ANCSA defines the term "Native" to mean a United States citizen who is one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood. 43 U.S.C. § 1602(b).

[10] 43 U.S.C. § 1606. *See* Colt, *supra*, 25 J. Land Resources & Envtl. L. at 157-159.

[11] 43 U.S.C. § 1606(a) & (d). *See Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp.*, 517 F. Supp. 1255, 1256 (D. Alaska 1981).

[12] 43 U.S.C. § 1610(b). *See* Colt, *supra*, 25 J. Land Resources & Envt'l. L. at 155 (map showing all regional and Village Corporations). Villages eligible to form corporations under ANCSA "were defined as communities, neither modern nor urban, composed of at least twenty-five Natives, with Natives representing at least fifty percent of the village population." *Ukpeagvik Inupiat Corp.*, 517 F. Supp. at 1256 (citing 43 U.S.C. § 1610(b)(2)).

[13] 43 U.S.C. §§ 1606-1607. *See generally Doyon, Ltd. v. Bristol Bay Native Corp.*, 569 F.2d 491, 493 (9th Cir. 1978).

subsequently formed for non-resident Alaska Natives.[14])

Following incorporation, all eligible Alaska Natives within a particular region who were alive on December 18, 1971 (the date of the Act) received 100 shares of stock.[15] In addition, Alaska Natives who also lived in an eligible village became village stockholders. (Natives residing outside an eligible village became at-large Regional Corporation stockholders.[16]) Finally, following Congressional amendments to ANCSA in 1991, the Act authorizes Regional Corporations to issue additional shares to so-called "after borns" – Alaska Natives born after December 18, 1971 and their descendents.[17] Virtually every Alaska Native is now an ANCSA shareholder.[18]

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[14] 43 U.S.C. § 1606(c). *See* 13th Regional Corporation website at http://www.the13thregion.com (last visited Sept. 11, 2008).

[15] 43 U.S.C. § 1606(g).

[16] *See Ukpeagvik Inupiat Corp.*, 517 F. Supp. at 1257, n. 5 (citing 43 U.S.C. § 1606(g)). Four "urban corporations" in four specified areas (Sitka, Kenai, Juneau, and Kodiak) were also formed. 43 U.S.C. § 1613(h)(3). "Native group" corporations, consisting of communities of less than 25 but more than 3 Natives who comprise a majority of the residents of the locale, are also eligible to form corporations. 43 U.S.C. § 1613(h)(2).

[17] 43 U.S.C. § 1606(g) & (h). *See* Linxwiler, *supra*, 53 Rocky Mtn. Min. L. Inst. at 12-20.

[18] Alaska's estimated population in 2007 for those identifying themselves as "Alaska Native or American Indian" stood at 103,690. U.S. Census Bureau, *State Population Estimates – Characteristics: Race and Hispanic Origin*, http://www.census.gov/popest/states/asrh/SC-EST2007-04.html/ (then follow "Estimates of the Population by Race and Hispanic Origin for the United States: July 1, 2007" hyperlink). In Fiscal Year 2004, the thirteen Regional Corporations had about

Through this complex legislative scheme, Regional and Village Corporations effectuate ANCSA and serve the settlement beneficiaries and corporate shareholders – Alaska Natives.[19]

Key to the viability of the Native Corporations was the right granted to each to select and own land in fee simple. Through ANCSA, the twelve regional Native Corporations were able to select for conveyance from the United States a total of 44 million acres of land.[20] (The thirteenth regional corporation established for non-Alaska resident Natives does not own land.[21]) Additionally, the Regional Corporations own the subsurface rights (including mineral rights) to 22 million acres of Village Corporation lands.[22] The land grant to the twelve regional corporations made Native Corporations the largest private landowners in Alaska.[23]

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102,000 shareholders. U.S. Gov't Accountability Office, *Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight* 81 (GAO 06-399, Apr. 2006), *available at* http://www.gao.gov/new.items/d06399.pdf (last visited Sept. 18, 2008).

[19] 43 U.S.C. § 1606(g); 43 U.S.C. § 1607(c). *See Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991, 995 (9th Cir. 1994).

[20] 43 U.S.C. § 1611. *See also Doyon, Ltd.*, 214 F.3d at 1311 (explaining ANCSA land grants).

[21] 43 U.S.C. §§ 1606 (c), 1611.

[22] *See* 43 U.S.C. § 1613(f); *Lesnoi, Inc. v. Stratman*, 154 F.3d 1062 (9th Cir. 1998); *See Tyonek Native Corp. v. Cook Inlet Region, Inc.*, 853 F.2d 727, 730 (9th Cir. 1990)

[23] U.S. Dept. of Health & Human Serv., *Overcoming Challenges to Business and Economic Development in Indian Country* at 43

Congress intended for ANCSA land to provide economic benefits to the Regional and Village Corporations and their shareholders.[24] As the Ninth Circuit recounted in *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723 (1978):

> The land grant under ANCSA was a generous one, clearly intended to exceed the subsistence needs of Natives and to give them a significant economic stake in the future development of Alaska. As stated by the House Committee on Interior and Insular Affairs: The acreage occupied by villages and needed for normal village expansion is less than 1,000,000 acres. While some of the remaining 39,000,000 acres may be selected by the Natives because of its subsistence use, most of it will be selected for its economic potential.[25]

Congress intended for mineral development to be one of the primary means for realizing the Native lands' economic potential. The House Committee on Interior and Insular Affairs stated that the Regional Corporations were to:

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(2004), *available at* http://aspe.hhs.gov/hsp/wtw-grants-eval98/tribal-dev04/report.pdf (last visited Sept. 17, 2008).

[24] *See City of St. Paul v. Evans*, 344 F.3d 1029, 1031-1032 (9th Cir. 2003).

[25] *Id.* at 731 (citing H.R. Rep. No. 92-523 (92d Cong., 1st Sess. 5, reprinted in U.S. Code Cong. & Admin. News pp. 2192, 2195) (1971) (emphasis added).

> ... each share equally in the mineral developments. The mineral deposits ... [are] included as part of the total economic settlement. We feel it is very important for these mineral deposits to be available to all of the natives to further their economic future.[26]

Accordingly, the Regional Corporations used mineral potential as a prime criterion in choosing their land selections.[27]

ANCSA's statutory provisions and its legislative history make clear that resource development is one of the primary means by which Congress intended to enable Native Corporations to bring economic benefits to their shareholders. But the Ninth Circuit's flawed interpretation of the Clean Water Act in *SEACC v. Corps of Engineers* threatens to stymie the economic development purposes of ANCSA, to the detriment of all Native Corporations and of the Native community generally.

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[26] H.R. 92-523 (Sept. 28, 1971).

[27] *Cf. Aleut Corp. v. Arctic Slope Regional Corp.*, 421 F. Supp. 862, 866 (D. Alaska 1976).

### B. ANCSA's requirement that Native Corporations share with one another their resource development-generated revenue ensures that all ANCSA shareholders benefit from mining

When Congress enacted ANCSA, it recognized that the subsurface mineral wealth and economic potential of the lands selected by the Native Corporations would not be uniformly distributed. So ANCSA contains a natural resource revenue-sharing provision: Section 7(i).[28]

ANCSA Section 7(i) is "'intended to achieve a rough equality in assets among all the Natives. . . . (The section) insures that all of the Natives will benefit in roughly equal proportions from these assets.'"[29] As recited by the Ninth Circuit, under Section 7(i):

> 70% of all revenues received by each Regional Corporation from timber and subsurface estate resources must be

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[28] 43 U.S.C. § 1606(i) (ANCSA § 7(i)). *See generally*, Linxwiler, *supra*, 53 Rocky Mtn. Min. L. Inst. At 12-25–29.

[29] *Chugach Natives, Inc.*, 588 F.2d at 732 (quoting *Aleut Corp.*, 421 F. Supp. at 867). *See also Ukpeagvik Inupiat Corp.*, 517 F. Supp. at 1257 ("Section 1606(i) ... achieves a rough equality by allowing for the fact that some regions are resource-poor, while others possess a wealth of natural resources"); 132 Cong. Rec. S8171 (June 23, 1986) (Senator Stevens, in describing section 7(i) distributions, stating that Regional Corporations "are merely acting as agents for the other Native Corporations so far as these revenues are concerned").

> divided among all 12 Regional Corporations in proportion to the number of Natives enrolled in each region. At least 50% of the revenues so received must be redistributed among the Village Corporations.[30]

Section 7(i) mandates that when mineral or timber resources are developed on Native Corporation land, all 102,000 ANCSA Native shareholders[31] benefit. As of 2007, more than $760 million has been redistributed amongst the Regional Corporations under Section 7(i).[32] In 2007 alone, $125 million in mining industry payments to Native Corporations were redistributed amongst Regional and Village Corporations.[33]

## II. MINING IS ONE OF ALASKA'S FASTEST-GROWING INDUSTRIES, CREATING THOUSANDS OF JOBS FOR ALASKANS AND GENERATING HUNDREDS OF MILLIONS OF DOLLARS IN REVENUE FOR THE STATE

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[30] *Chugach Natives, Inc.*, 588 F.2d at 724 (footnote omitted) (citing ANCSA § 7(j) (43 U.S.C. § 1606(j)) (footnote omitted).

[31] U.S. Gov't Accountability Office, *Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight* 81.

[32] Ass'n of ANCSA Presidents and CEOs, *Wooch Yaayi: Woven Together* at 14 (2007).

[33] *Amicus Curiae* Brief of Pacific Legal Foundation in support of Petitioners at 16.

Mining is one of the fastest-growing industries in Alaska. The value of the state's mining industry is now well over $1 billion annually, and growing rapidly.[34] The Alaska Minerals Commission reports that revenue to the State of Alaska from the minerals industry increased an astounding 292 percent between 2006 and 2007,[35] totaling $151.6 million in Fiscal Year 2007.

As of 2006, thirty-three hard-rock or coal mines were in the operational, exploration or development stage – all in remote, rural parts of Alaska.[36] These mines have so far generated thousands of jobs throughout the state. The Alaska Division of Geological & Geophysical Survey reported that the mineral mining industry employed an estimated 3,523 full-time workers in 2006 – an increase of 702 jobs from 2005.[37] And the number of mineral mining jobs in the state increased 23 percent

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[34] Alaska Dept. of Commerce, Community, & Economic Development, Office of Economic Development: Minerals Development, http://www.commerce.state.ak.us/oed/minerals/mining.htm (last visited Sept. 12, 2008).

[35] Alaska Minerals Comm'n, *Report of the 2008 Alaska Minerals Comm'n* at iv, *available at* http://www.commerce.state.ak.us/oed/minerals/pub/mineralsreport2008_web.pdf (last visited Sept. 12, 2008).

[36] Alaska Div. of Geological & Geophysical Surveys, *Alaska's Mineral Industry 2006: Special Report 61* at 5 (2006), *available at* http://www.dggs.dnr.state.ak.us/pubs/pubs?reqtype=citation&ID=15860 (last visited Sept. 16, 2008).

[37] *Id* at 2.

between 2000 and 2007.[38] Additionally, the mining support activities industry provided an average of 7,606 jobs during 2006.[39]

Just as important, Alaska mining jobs pay top wages. The Alaska Department of Labor & Workforce Development reported that the average monthly income for non-oil and gas related mining occupations in 2007 was $6,884 – or approximately $82,608 per year – more than double the average annual salary for all occupations in Alaska during the same year.[40] Workers in the mining support industry earned even more, with an average monthly income of $7,183 in 2006.[41] These facts show how the mining industry can improve economic conditions for Alaska generally and ANCSA shareholders in particular.

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[38] Alaska Dept. of Labor & Workforce Development, *Alaska Economic Trends* at 8 (Sept. 2008), *available at* http://labor.alaska.gov/trends/sep08.pdf#art1 (last visited Sept. 16, 2008).

[39] Alaska Div. of Geological & Geophysical Surveys, *supra*, at 2.

[40] The Alaska Dept. of Labor & Workforce Development, *Preliminary 2007 Quarterly Census of Employment & Wages* at 1, *available at* http://www.labor.state.ak.us/research/ee/ee07.pdf (last visited Sept. 12, 2008).

[41] Alaska Div. of Geological & Geophysical Surveys, *supra* at 2 (2006).

## III. RESPONSIBLE RESOURCE DEVELOPMENT IS CRUCIAL TO FULFILLING THE PURPOSES OF ANCSA, BUT THE NINTH CIRCUIT'S DECISION THREATENS THE ECONOMIC PROSPERITY MINING HAS BROUGHT TO ANCSA CORPORATIONS IN RECENT YEARS

### A. Limited economic opportunities for Alaska Natives have mired rural Native communities in poverty and associated social problems

Generating revenue through natural resource development on Native Corporation lands in Alaska – and the sharing of the wealth created under Section 7(i) – is critical to fulfilling ANCSA's purpose of creating economic opportunities for Alaska Natives.

When it enacted ANCSA, Congress saw a way to end the poverty that gripped many Alaska Native communites.[42] As the Senate Committee on Interior and Insular Affairs reported while deliberating the Act:

> [Alaska Natives] are among the most disadvantaged citizens of the United States in terms

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[42] *See* Colt, *supra*, 25 J. Land Resources & Envtl. L. at 157-158 & n. 13.

> of income, employment, educational attainment, life expectancy, health, nutrition, housing, and every important indicator of social welfare.[43]

Today, many rural Alaskans still are hard put to make ends meet. Alaska Natives comprise 82 percent of the population in rural parts of the state.[44] Poverty and unemployment rates amongst rural Alaskans – particularly rural Alaska Natives – still far outpace those of their urban Alaska counterparts.[45] Per-capita income of Alaska Natives is about half that of non-Natives.[46]

The geography of rural Native Alaska is at the root of these statistics. The small size and remoteness of rural Alaska villages limit their economic potential; nearly all of these communities are accessible only by plane, or in some cases, by boat in the warmer months.[47] The lack of arable land and

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[43] Senate Rep. No. 92-405, at 72 (1971).

[44] Alaska Native Policy Center, *Our Choices, Our Future: The Status of Alaska Natives* 2004 at 5, *available at* http://www.firstalaskans.org/documents_fai/ANPCa.pdf (last visited Sept. 17, 2008).

[45] *See id.* at 86-89; Lee Huskey, *Alaska's Village Economies*, 24 J. Land Resources & Envt'l L. 435, 437, 440-43 (2004) Alaska Native Policy Center, *Our Choices, Our Future: The Status of Alaska Natives* at 63.

[46] J.A. 503a, ¶ 20.

[47] Huskey, *supra*, 24 J. Land Resources & Envt'l L. at 437 (2004).

other resources necessary for industry to take hold also inhibits economic development.[48]

The precipitously high cost of living exacerbates the economic hardships in Alaska's "bush."[49] Alaskans living in rural villages pay extraordinarily high prices for energy, transportation, and communications due to their communities' isolation far from the road system, their villages' low populations, and the verities of Alaska's extreme climate.[50] In some villages, transportation costs alone may double the price of goods and services.[51] The price of home heating oil in many villages in rural Alaska now hovers around $9/gallon, with a gallon of milk approaching $11/gallon – and the lack of economic opportunities available to offset these costs has caused a "social and cultural crisis" of "out-migration" from villages to urban Alaska.[52]

Mining on ANCSA lands counters these economic challenges by stimulating the job market

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[48] See Gigi Berardi, *Natural Resource Policy, Unforgiving Geographies, and Persistent Poverty in Alaska Native Villages*, 38 Nat. Resources J. 86, 87 (1998)

[49] In Alaska, small, rural, difficult to access, and usually largely-Native communities are commonly referred to as "bush" communities. *See, e.g.*, Rachel King, *Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska*, 77 Or. L. Rev. 1 (1998).

[50] Berardi, *supra*, 38 Nat. Resources J. at 96-97.

[51] *Id.* at 87-88.

[52] Rob Stapleton, *Senate hearing in Bethel paints bleak economic picture*, Anchorage Daily News (Sept. 15, 2008), available at http://www.adn.com/money/story/526301.html/.

and providing greater financial self-sufficiency for a growing number of ANCSA Native shareholders.

### B. Alaska's growing mining industry plays an increasingly crucial role in fulfilling ANCSA's economic purposes and alleviating poverty amongst Alaska Natives

#### 1. Mining's positive impact on rural Alaska

Rural Alaska is just beginning to benefit economically from the state's growing mining industry. The Alaska Minerals Commission reports that the mining industry's growth has created a significant need for skilled workers – and the opportunity to bring employment and private-sector investment to rural Alaska.[53] And according to the Alaska Department of Commerce, employment in the mining industry is a significant contributor to rural employment and corresponding economic prosperity.[54]

#### 2. Increased mining in rural Alaska benefits ANCSA corporations and their Native shareholders

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[53] Alaska Minerals Comm'n, *Report of the 2008 Alaska Minerals Comm'n* at 8.

[54] Alaska Dept. of Commerce, Community, & Economic Development, Office of Economic Development, Minerals Development.

In the years following passage of ANCSA, some Regional Corporations struggled to realize the promise of ANCSA.[55] But the situation has begun to turn around within the last ten years or so, and a majority of Native Corporations now generate significant profits and distribute substantial shareholder dividends.[56] While many factors have played into the ANCSA corporations' success,[57] resource development on corporate lands is now a major contributor to this turnaround.

The NANA Regional Corporation (located in the remote far northwest corner of Alaska)[58] provides the preeminent example of how large-scale mining can help fulfill ANCSA's promise of meeting the "economic and social"[59] needs of Alaska Natives. As part of its ANCSA land selections, NANA took title to lands in northwest Alaska that contain the world's largest zinc deposit.[60] The Red Dog Mine – the

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[55] Colt, *supra*, 25 J. Land Resources & Envtl L. at 160; Linxwiler, *supra*, 53 Rocky Mtn Min. L. Inst. at 12-60 – 12-61.

[56] Colt, *supra*, at 162-163; Linxwiler, *surpra*; Alaska Dept. of Commerce, Community, & Economic Development, *Alaska Economic Performance Report 2005: Alaska Native Corporations* at 17-21 (available at http://www.commerce.state.ak.us/dca/pub/AEPR_Web_2005.pdf ) (last visited Sept. 12, 2008). For instance, in 2004, the thirteen Regional Corporations and twenty-nine Village Corporations surveyed generated combined revenue of $4.47 billion, distributed $117.5 million in dividends, and employed 3,116 Alaska Native shareholders. Linxwiler, *supra*, at 12-61.

[57] *Id.*

[58] 43 U.S.C. § 1606(a)(3). *See* NANA Corporation website, at http://www.nana.com (last visited Sept. 12, 2008).

[59] 43 U.S.C. § 1601(b).

[60] *See* Colt, *supra*, 25 J. Land Resources & Envtl L. at 161.

world's largest zinc mine – was developed on this land.[61] The Red Dog Mine is operated through a joint venture arrangement between NANA and Teck Cominco Alaska Incorporated.[62]

NANA and its shareholders reap great benefits from this arrangement. In 1996, NANA shareholders held almost 50 percent of the jobs at Red Dog Mine.[63] More recently, shareholder employment at the mine has reached 60 percent.[64] (Through the joint venture agreement, the long-term goal for shareholder employment is 100 percent.[65]) In 2007, Red Dog Mine supported 475 full-time jobs (plus 80 part-time jobs) with a total payroll of $48.9 million.[66] The partnership also provides many other economic and social benefits to NANA and its shareholders. [67]

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[61] *See* NANA Regional Corporation website, http://www.nana.com/ (last visited Sept. 12, 2008, *supra*); Teck Cominco: Red Dog Mine, http://www.teckcominco.com/Generic.aspx?PAGE=Red+Dog+Site%2FNANA&portalName=tc/ (last visited Sept. 12, 2008).

[62] *Id.*

[63] Colt, *supra*, 25 J. Land Resources & Envtl L. at 161.

[64] NANA Corporation: Red Dog Mine, available at http://www.nana.com/pdfs/NANA%20and%20Mining.pdf (last visited Sept. 12, 2008).

[65] *Id.*

[66] Teck Cominco: Economic Benefits to Alaskans, http://www.teckcominco.com (last visited Sept. 12, 2008).

[67] NANA Regional Corporation, *Red Dog Mine* 15, *available at* http://www.nana.com (last visited Sept. 18, 2008).

On top of these benefits, Teck Cominco also pays substantial royalties to NANA. Teck Cominco has paid $222 million in royalties to NANA since 1982; NANA received $58 million in royalties in 2007 alone.[68] While much of this revenue goes back to NANA shareholders, through the revenue-sharing provisions of ANSCA § 7(i), most of this revenue goes to other regional and village Native Corporations and their shareholders.[69]

Other Native Corporations are now attempting to recreate the success of the Red Dog mine on their own lands. The Calista Corporation is another example—it is one of the twelve regional land-owning Native Corporations (and one of the largest, with 13,000 shareholders[70]), and owns land in southwest Alaska.[71] Southwest Alaska is one of the poorest regions of the state, with high unemployment, and low per capita income relative to the extreme cost of living.[72] An estimated 25 percent

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[68] *Id.*

[69] 43 U.S.C. § 1606(i), (j). *See also* NANA Corporation: ANCSA at 3, *available at* http://www.nana.com/pdfs/ANSCA.pdf (last visited Sept. 12, 2008); Tim Bradner, *Teck Cominco sets revenue records at Red Dog mine*, Alaska J. of Commerce (Nov. 4, 2007), *available at* http://www.alaskajournal.com/stories/110407/nat_20071104022.shtml (last visited Sept. 12, 2008).

[70] Colt, *supra*, 25 Land Resources & Envtl L. at 161-162.

[71] 43 U.S.C. § 1606(a)(4). *See* Calista Corporation, website, http://www.calistacorp.com/ (last visited Sept. 12, 2008).

[72] Colt, *supra*, at 161-162; Huskey, *supra*, 24 J. Land Resources & Envtl. L. at 438-443.

of the Native population in southwest Alaska lives in poverty – more than any other region in the state.[73]

The Donlin Creek Gold Mine project holds the potential to increase the economic opportunities available to Calista shareholders. Donlin Creek is a world-class gold deposit on native land owned by Calista and the Kuskokwim Village Corporation.[74] The Donlin Creek deposit is estimated to hold over 29.5 million ounces of gold (worth over $26.5 billion at current prices).[75]

If it is developed, Donlin Creek holds the potential to be the "next Red Dog" for the Calista and Kuskokwim Native Corporations and their shareholders.[76] Donlin Creek is currently in the advanced exploration and pre-development stages, and the Donlin Creek Project is now "the single largest economic stimulus in the Kuskokwim Region", according to the Calista Corporation.[77]

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[73] Alaska Native Policy Center, *Our Choices, Our Future: The Status of Alaska Natives 2004* at 100.

[74] *See* Elizabeth Bluemink, *Donlin Creek gold supply leaps 77 percent*, Anchorage Daily News (Feb. 9, 2008), *available at* http://www.adn.com/money/story/309877.html (last visited Sept. 12, 2008).

[75] *Id.*

[76] NANA Corporation: Red Dog Mine at 1, *available at* http://www.nana.com/pdfs/NANA%20and%20Mining.pdf (last visited Sept. 12, 2008).

[77] Calista Corporation: Land & Natural Resources: Donlin Creek, http://www.calistacorp.com/landresources/projects/donlincreek.asp (last visited Sept. 12, 2008).

Mine operators NovaGold Resources and Barrick Gold Corporation have spent $120 million on the Donlin Creek project. As of 2006, Alaska Natives (Calista and Kuskowkwim shareholders) made up 93 percent of the Donlin Creek workforce; these employees have cumulatively earned in excess of $2 million per year from the project.[78] And these workers came from twenty-three villages in the rural Yukon-Kuskokwim region surrounding Donlin Creek – where economic needs are most acute.[79]

Red Dog and Donlin Creek merely exemplify the critical role mining serves in fulfilling ANCSA's economic promise – not only to NANA and Calista and their shareholders, but under ANCSA § 7(i), to all Native Corporations and their shareholders. In addition, mining provides economic benefits to Native corporations and communities beyond the rents and royalties paid to ANCSA Corporations, as illustrated in the next section regarding Goldbelt Inc's relationship with the Kensington mine. By generating revenue and jobs, large-scale mining is helping to fulfill ANCSA's economic promise. And crucially, projects such as Red Dog, Donlin Creek, and Kensington are in remote areas of the state where other economic opportunity and private-sector investment is largely absent.

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[78] *Id.*; Alaska Div. of Geological & Geophysical Surveys, *Alaska's Mineral Industry 2006: Special Report 61* at 19.

[79] *Id.*; Huskey *supra*, 24 J. Land Resources & Envtl. L. at 438-443.

### C. The Ninth Circuit's decision threatens to impede economically beneficial mining projects and harm Native Corporations and their shareholders

Large-scale mining operations on Native lands generate substantial revenue and employment for Native Corporations and their shareholders. Shareholders often use their ANCSA shareholder disbursements to support subsistence activities, which are a central element of Alaska Native family economies, as well as personal and cultural identity.[80] Thus, these mining operations are crucial in fulfilling ANCSA's purposes. But as the Kensington mine illustrates, the Ninth Circuit's decision threatens to halt these positive developments.

When it held Coeur Alaska's Section 404 permit to be invalid under the Clean Water Act, the Ninth Circuit also vacated a permit the Corps issued to Goldbelt, Inc. (the ANCSA corporation for the Juneau region) for construction of a marine terminal facility.[81] (The background and purpose of the marine terminal facility are discussed at length in Goldbelt's brief to the Court). Although the Kensington mine is located on state rather than ANCSA lands, Goldbelt's facility was an integral part of the Kensington project's operating plan.[82]

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[80] Bedardi, *supra*, 38 Natural Resources J. at 98-99.

[81] J.A. 517(a).

[82] *See generally*, Brief of Goldbelt, Inc. in support of Petitioners

The Ninth Circuit's decision dealt a serious blow to Goldbelt's mission to generate jobs and income for its shareholders in connection with the Kensington project.[83] The effects of the Ninth Circuit's decision are especially severe given the bleak economic picture in southeast Alaska caused by the decline of the timber and fishing industries, and stagnating government employment.[84]

The Kensington project shows how the court of appeals' decision will obstruct environmentally-sound resource development in Alaska. As the amicus brief of the National Mining Association (filed in support of the petitioner) shows, the disposal of mining fill often requires placement in water bodies or wetlands, since mining typically takes place in rugged terrain where water bodies are the feasible site for disposal.

This is particularly true in Alaska, given the state's extensive amount of wetlands. Alaska holds 175 million acres of wetlands, comprising about 43 percent of Alaska's surface area – in other words, more than the rest of the United States combined.[85] Native Corporations are the largest private

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[83] Brief of Goldbelt, Inc. in support of Petition for Review at 5-6.

[84] *Id.* at 4-5.

[85] Amicus Brief of Council of Alaska Producers in support of Petitioner at 4-5 (citing Environmental Protection Agency et al, *Alaska Wetlands Initiative Summary Report* at 2 (1994).

landowners in Alaska, and about 11 percent of Alaska's wetlands are located on ANCSA lands.[86]

These wetlands are most abundant in the northern and western regions of the state, where the proportional Alaska Native (and ANCSA shareholder) population is highest.[87] ANCSA requires that these lands be available for economic development purposes; the Clean Water Act should not be interpreted in a way that eviscerates this mandate. *Cf. City of Angoon v. Marsh*, 749 F.2d 1413, 1418 (9th Cir. 1984) (permitting Native Corporation to log ANCSA lands within Admiralty Island National Monument on rationale that lands were selected for purposes of their economic benefit).

As the Council of Alaska Producers points out, developing large-scale mines in these regions is virtually impossible without impacting these pervasive wetlands in one way or another.[88] And as demonstrated above, it is likely that such mines will be located on ANCSA lands, or will otherwise benefit Native Corporations and their shareholders who are dispersed throughout rural Alaska – in terms of jobs, revenue and dividends, and social programs provided by the Corporations.[89] But the Ninth Circuit's

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[86] *Id.* at 5.

[87] *Id.* at 5-6; Alaska Native Policy Center, *Our Choices, Our Future: The Status of Alaska Natives 2004* at 37-39.

[88] See Amicus Brief of Council of Alaska Producers at 8.

[89] U.S. Gov't Accountability Office, *Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight* 82-83 (describing direct and indirect benefits ANCSA corporations provide to Native shareholders).

flawed reasoning leaves the viability of future resource development on ANCSA lands in doubt.

The Clean Water Act should continue to play its vital role in ensuring that natural resources are developed in an environmentally-responsible manner. But in this case, the Ninth Circuit's holding – that the Clean Water Act prohibits the Corps of Engineers from issuing a Section 404 permit for the discharge of fill material whenever the discharge implicates an effluent restriction contained in Section 402 or its implementing regulations – runs counter to the plain language of the Act, and overturns the EPA's and Corps' carefully-considered permitting program for the regulation of mine tailings.

And contrary to this Court's long-established principle of administrative law, the Ninth Circuit's decision has set a dangerous precedent against the extraordinary deference that must be afforded to an agency's interpretation of its own regulations. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Given the Ninth Circuit's failure to accord such deference in this case, the doors are wide open for the federal courts to strike down the permitting agencies' regulations governing other resource development projects – even where such a plan has the least impact on the environment of all available alternatives (as in this case).

## CONCLUSION

Mining is critical to Alaska's economic future, and especially to the future of Alaska's economically disadvantaged Native communities. But the Ninth Circuit's erroneous interpretation of the Clean Water Act's permitting requirements threatens to halt future mining projects. This Court should reverse the Ninth Circuit's flawed decision, and restore to the federal permitting agencies the authority to maximize the responsible development of Alaska's mineral resources – and the concomitant benefits that flow to Native Corporations and their shareholders in Native communities throughout Alaska.

Respectfully submitted,

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